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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 210

AUBURN SAVINGS BANK,
EASTPORT SAVINGS BANK,
SKOWHEGAN SAVINGS BANK,

Petitioners,

vs.

PORTLAND RAILROAD COMPANY,
CENTRAL MAINE POWER COMPANY,
PORTLAND COACH COMPANY,
CUMBERLAND COUNTY POWER & LIGHT COMPANY,
PUBLIC UTILITIES COMMISSION OF THE STATE OF MAINE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE.

FRED N. OLIVER,
MICHAEL F. McCARTHY,
WILLARD P. SCOTT,
Attorneys for Petitioners,
110 East 42nd Street,
New York 17, N. Y.

FRANKLIN R. CHESLEY,
Of Counsel.
477 Congress Street,
Portland, Maine.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, AUBURN SAVINGS BANK, EASTPORT SAVINGS BANK and SKOWHEGAN SAVINGS BANK, respectfully pray for a writ of certiorari to the Supreme Judicial Court of Maine to review an order entered February 28, 1949 by said Court directing the dismissal of petitioners' bill of complaint herein for lack of jurisdiction over the subject matter for the reason that applicable state law has been supplanted by an overriding Federal statute.

Statement.

Petitioners, three mutual savings banks organized under the laws of Maine, acquired for investment 720 shares of Portland Railroad Company, a street railway (R. 49-51, 71, 75-76). Dividends on the stock were guaranteed at 5% by a utility company, which, as a result of merger is presently known as Central Maine Power Company. This guaranty was contained in a 99 year lease from the Railroad Company to the Power Company and in a legend placed upon the stock certificates of the Railroad Company (R. 1274, 1294).

The Power Company, having acquired and exercised effective stock control of the Railroad Company, proposed a cancellation of the lease and the guaranty, upon payment by it of certain obligations of the Railroad Company and of $110 per share on its stock. The Power Company submitted this proposal to the Securities and Exchange Commission (hereinafter called the "Commission") under Section 11(e) of the Public Utility Holding Company Act (hereinafter called the "Holding Company Act").* The Commission authorized submission of the proposal to the Railroad Company and its stockholders, reserving to the latter the exercise of their rights under the Maine appraisal statute or by other means. The Power Company secured approval of a majority of the stockholders of the Railroad Company and, notwithstanding the objection of petitioners, immediately proceeded to carry out its proposals.

Petitioners promptly instituted proceedings in equity in the courts of Maine against the Railroad Company and the Power Company to obtain an adjudication of their rights, including a setting aside of the transaction as to the stock.

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* 49 Stat. 838; 15 U. S. C. A. §79.

The sitting justice held that the price offered the holders of the guaranteed stock was inequitable, but otherwise denied petitioners' contentions. Upon appeal by petitioners, the Supreme Judicial Court held, among other things, that the state courts lacked jurisdiction to adjudicate rights of petitioners for the reason that the Holding Company Act gave exclusive jurisdiction to the Commission and the latter lacked power to reserve to security holders the exercise of their rights in state tribunals. Review of this decision is sought.

The Original Transaction.

By agreement dated February 15, 1912, the Railroad Company leased all of its property to the predecessor of the Power Company for a term of 99 years (R. 71-A). The lessee agreed, among other things,

> (a) to pay an annual rental equivalent to interest on the debt of the Railroad Company and a 5% guaranteed dividend on the latter's $100 par value stock;
>
> (b) to place a guaranty upon the stock certificates in accordance with the lease (R. 80-A to 88-A).

To facilitate the carrying out of its guaranty, the lease provided that the Power Company might pay dividends direct to stockholders of its lessor, the Railroad Company. Pursuant to the lease provisions, the directors of the Railroad Company adopted a resolution at the outset, requesting that dividends be paid directly to stockholders (R. 83-A). All dividends were so paid through 1944 (R. 43-47).

Operations Under the Lease and Guaranty.

Commencing about 1930 the Power Company gradually abandoned street railway operations and substituted bus transportation, the substitution having been completed by 1941 (R. 448-A, 449-A, 2047, 2095).

Commencing about 1930 and extending through 1940 the Power Company acquired bonds and stock of the Railroad Company, ultimately acquiring 9,795 shares, or 49% of the total outstanding and $1,310,000 principal amount of bonds, or 34.3% of the total outstanding (R. 267-A).

To the extent made after enactment of the Holding Company Act, these acquisitions were authorized by the Commission pursuant to that Act (R. 1721). In its application, the Power Company stated that such acquisitions would not be detrimental to the carrying out of Section 11 of the Act (R. 1689).

A controlling interest in the Power Company was acquired by a holding company about 1930 (R. 26A, 171-A, 1098-1101). All officers and directors of the Railroad Company ultimately were officers or directors of the Power Company or the holding company (R. 201-203, 455-A) and the domination of the Railroad Company by the Power Company was completed.

Recognizing its duty under the lease to provide a purchaser for refunding bonds upon the maturity of outstanding obligations of the Railroad Company (R. 101-A), the Power Company set up reserves on its books, ultimately aggregating $2,285,235, for acquisition or refunding of outstanding bonds (R. 268-A, 322-323). Subsequently, the maintenance of such reserves was required by the Commission as a condition upon the declaration of dividends by the Power Company (R. 1745, 1832). Until the latter part of 1944, the actions of the Power Company were consistent with, and seemingly recognized the existence of, an obligation not terminable by it except upon default of the Railroad Company or a taking by eminent domain (R. 1454-1457; 1463). As the sitting justice found, continued adherence to and compliance with the lease seem to have been contemplated until 1944 (R. 453-A, 454-A, 459-A).

Development of the 1944 Proposals.

During the latter part of 1944, the Power Company, lessee, conceived a scheme for accelerating and liquidating its liabilities under the lease and guaranty.

This scheme, embodied the following (R. 463-A to 465-A):

> (a) Sale of all properties of the Railroad Company;
>
> (b) The Power Company to pay the Railroad Company an amount sufficient to provide for payment of all publicly held bonds and for distribution to all stockholders, other than the Power Company, of $110 per share and to save the stockholders harmless from liability;
>
> (c) The Power Company to surrender for cancellation all of its securities of the Railroad Company;
>
> (d) The lease to be terminated and the Power Company released from all liability thereunder.

The avowed purposes of the scheme were twofold: *first*, to eliminate an expected unprofitable operation after the war and, *second*, to offset substantially all of the costs of the scheme against income taxes at the time of their greatest impact upon the Power Company (R. 156-157, 2000).* In addition, the Power Company would escape two potential liabilities, (a) that of providing for maturities in 1945 and 1951 of $2,335,000 publicly held obligations of the Railroad Company and (b) a claim of the Railroad Company pursuant to the maintenance provisions of the lease for approximately $4,800,000 for property abandoned by the Power Company (R. 197-A, 198-A, 779).

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* The ultimate tax saving was represented to the Commission at a minimum of $3,240,000 (R. 268-A).

Proceedings Before the Commission.

The proposals were adopted by the board of the Power Company on October 27, 1944 (R. 820-821) and on November 10, 1944, they were filed with the Commission as a plan under Section 11(e) of the Holding Company Act. The plan, however, contemplated that these proposals would be submitted as an "offer" to the Railroad Company (R. 470-A).

Prior to that time the Commission had not directed a divestment of operations of the Railroad Company properties (R. 730, 1112-1113). No such proposal had been included in its previous directions served upon the holding company (R. 726).* On the contrary, the Commission had specifically authorized, in 1940, the acquisition by the Power Company of stock of the Railroad Company (R. 1721, 2233, 2241).

At the hearing before the Commission on December 7, 1944, pursuant to notice given November 20, 1944, the security analyst of the Savings Banks Association of Maine, of which petitioners are members, appeared and stated that he regarded the proposed offer of $110 per share as inadequate (R. 278-A, 1008-1010). No other objections were made. The Railroad Company was not a party to, or represented at, the proceedings.

The findings and opinion and "order approving plan" were issued on December 19, 1944, twelve days following the hearing. The Commission found the plan to be "necessary" under Section 11(b)(1) of the Holding Company Act and fair and equitable to the security holders affected. In so doing, it stated that "it is clear that important provisions of the lease are ambiguous" (R. 273-A).

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* The plan of the Power Company's parent holding company, filed October 24, 1944, pursuant to Section 11 of the Holding Company Act, contained no provision dealing with the Railroad Company lease or the guaranty of dividends on its stock (R. 1778).

In its findings and opinion the Commission said (R. 278-A):

> "• • • stockholders dissenting from the proposed plan will have a right, pursuant to Maine statute, to have their stock appraised. Pertinent information concerning such rights will be included with the other solicitation material to be sent to stockholders."

Accordingly, the Commission's report issued pursuant to Section 11(g) of the Holding Company Act to guide the security holders of the Railroad Company in their vote, stated as its conclusion (R. 258-A):

> "The security holders of Portland have the right under Maine laws to have their stock appraised and receive an amount for their stock based on such appraisal. Although this Commission has found the plan fair and equitable, *whether or not any security holder should vote in favor of the plan or choose to exercise his rights under the appraisal statute or by other means should be determined by his independent judgment.* • • • " (Emphasis supplied.)

Consummation of the Scheme.

Following Commission approval, the proposals were embodied in a letter, dated December 20, 1944, from the Power Company, lessee, to the Railroad Company, lessor, as an "offer", "submitted for acceptance within nine days of the date hereof but not thereafter" (R. 204-A, 1993). At a meeting of the stockholders of the Railroad Company held December 28, 1944, the offer of the Power Company was approved by holders of a majority of the shares (including those owned by the Power Company). Petitioners voted against acceptance and filed written objection to the action taken (R. 1503 *et seq.*).

The following day, 22 days after the Commission hearing and 10 days after its report was issued, the scheme

was consummated. The assets of the Railroad Company were transferred, deeds recorded, the mortgages discharged of record and funds irrevocably deposited in trust to cover the payments to security holders of the Railroad Company (R. 1166, 1202). The bonds of the Railroad Company were duly called in accordance with the terms of the contract and, consequently, those of the petitioners holding such bonds accepted payment therefor (R. 1773, 2120-2121).

No application was made to a federal district court for enforcement of the Commission's order (R. 1773).

The Proceedings Below.

Petitioners promptly filed a bill in equity, in the Supreme Judicial Court of Maine, seeking among other things an adjudication of the interests and rights of petitioners.

Chief Justice Sturgis of Maine, the sitting justice, found no "actual intentional fraud" (R. 501-A), but held that "the action of the majority stockholders • • • was unfair and oppressive to the minority stockholders and equity should intervene" (R. 515-A *et seq.*). He concluded that fair treatment required payment of $119.25 per share instead of $110 per share, saying (R. 589-A):

> "There was here more than difference of opinion. There was clear error in computation and unwarranted regard for contingencies that could not arise and to compel the minority stockholders of the Railroad Company to abide by the results is unjust. They do not appear to have a remedy at law. They are entitled to a relief in equity."

In other respects the application of petitioners was denied (R. 622-A).

On appeal by petitioners, the Supreme Judicial Court of Maine concurred with the findings of the sitting justice as

to lack of actual fraud but concluded, on the authority of *Schwabacher* v. *United States*, 334 U. S. 182 (1948), that the Holding Company Act forbade the Commission from reserving to the stockholders their remedies at state law and removed all jurisdiction from the state courts, and consequently that petitioners' bill in equity should be dismissed.

The decision of the court below misconceived the nature of these proceedings. In its preoccupation with the question of the application of the *Schwabacher* case, it brushed aside without examination, not only the many of the contentions of petitioners, but, likewise, the conclusions of the Commission that petitioners were entitled to an independent adjudication of their rights in the state courts, as well as the findings of the sitting justice with respect thereto. For a fuller consideration of the facts and issues here involved this Court is respectfully referred to the opinion of the sitting justice, set forth at pages 432-A to 525-A of the Record, as modified at page 585-A.

Jurisdiction to Review.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code [62 Stat. 869, 929], the respondents having claimed an immunity from the jurisdiction of the courts of Maine under the Public Utility Holding Company Act of 1935 [49 Stat. 838; 15 U. S. C. A. sec. 79] and under authority exercised by the Securities and Exchange Commission. This claimed immunity was upheld by the Supreme Judicial Court of Maine by order dated February 28, 1949 (R. 2257, 2281).

The principal respondents claimed such immunity in their opening statement to the sitting justice (R. 1049-9, 1049-10). Petitioners controverted the claim (i) by objecting to the introduction in evidence of the report of the Commission on the ground that nothing contained in the

report bound the Maine courts (R. 250-251) and (ii) in their brief before the sitting justice.

The sitting justice denied respondents' contention and construed the report of the Commission as having left open for state court determination all questions as to the fairness of the treatment accorded the dissenting security holders, thus denying respondents' contentions (R. 505-A-506-A).

On appeal all questions raised in the trial court were open, under Maine procedure (R. 2267). Before the court below, the principal respondents contended in their brief that in view of the interstate commerce clauses of the Constitution and the provisions of the Holding Company Act, the state courts could not assume jurisdiction.

The court below held (R. 2276-77):

> "* * * in view of the case of *Schwabacher* v. *United States*, heretofore referred to, we think it was beyond the power of the SEC to delegate to the state court any of its authority which, if exercised, might be inconsistent with action which might be taken by the Commission in approving the plan which had been submitted in accordance with the federal statute. We feel that this restriction certainly applies to the reservation of a right to pursue any and all remedies in the state court and probably applies to a reservation of the right to seek the remedy provided by the statutes of Maine for an appraisal. In the light of the *Schwabacher* case we must hold that it was beyond the power of the state court to grant the relief which it did in this case. It could enter no decree which would be inconsistent with such action as was taken or might be taken by the Commission in the exercise of the exclusive jurisdiction given to it by the Holding Company Act."

Likewise in their brief before the court below, respondents took exception to four "Rulings of Federal Law" of

the sitting justice, namely, (a) that one issue was whether the action taken was illegal, (b) that another issue was whether the action was unfair and oppressive to the minority, (c) that the Commission's action must be construed as authorizing submission of an offer by reserving to each stockholder the exercise of his rights under the appraisal statute or by other means, and (d) that acceptance by the stockholders was clearly optional, and that dissenters' rights were preserved.

In addition to the statutory Federal questions, issues as to constitutionality were raised by petitioners, as follows:

1. The bill of complaint alleged that unless relief were granted, petitioners would be deprived of their contract rights under the Constitution of the United States (R. 58-A, see also R. 5-A, 26-A). This contention was denied by the decision of the court below, though no specific reference was made to it.

2. Petitioners' request for separate findings of law under Revised Statutes of Maine (1944), Chapter 95, Section 26, included a requested finding that the action taken violated the rights of petitioners contrary to the Fifth Amendment of the Constitution (R. 359-A). Separate findings were not made by the sitting justice, but his decision in effect denied petitioners' request.

3. Petitioners' interlocutory motion for rulings of law requested a ruling to the effect that any statute impairing petitioners' contract rights would be in violation of the Constitution of the United States (R. 541-A). This motion was denied (R. 583-A).

4. Constitutional questions were raised before the court below by petitioners' assignment of error Nos. 5 and 43,

contained in their brief before that court pursuant to Maine practice, as follows:

"ASSIGNMENT OF ERROR NUMBER FIVE

"• • • the contracts of lease and guaranty • • • created vested contract rights or property rights and remedies, none of which could be thereafter impaired or destroyed by any legislative act, State or Federal (not an exercise of the police power which is not an issue in this case) within the constitutional protection of the contract rights and remedies."

"ASSIGNMENT OF ERROR NUMBER FORTY-THREE

"We charge that to take any of the vested rights under this guaranteed stock from these plaintiffs would be a direct violation and repudiation of their constitutional rights—both State and Federal—in that it would impair their existing contract and property rights or their remedies incidental thereto."

Rulings on assignments of error need not be specifically given under Maine procedure, but the decision of the court below denied petitioners' contentions in whole.

Opinion Below.

The opinion of the court below (R. 2257) is reported in *Auburn Savings Bank* v. *Portland Railroad Company*, ... Me. ....., 65 Atl. (2d) 17 (1949).

Questions Presented.

1. Is a state court deprived of all jurisdiction to determine questions of state law solely because the Commission, pursuant to Section 11(e) of the Holding Company Act, approves a so-called "plan" for divestment of securities

and cancellation of a lease and an obligation of guaranty by a utility company subsidiary of a registered utility holding company, where the purported plan is merely an offer and where the report of the Commission expressly reserves to each security holder the right to determine for himself whether to accept the offer or to exercise his rights under state law?

2. Is the decision of the court below correct in holding that the Commission lacks power, under Section 11(e) of the Holding Company Act, to reserve to each affected security holder the right to determine for himself whether to accept the plan offered or to secure a determination of his rights under state law?

3. Does Section 11(e) of the Holding Company Act grant power to the Commission to determine all questions of state law, so as to deprive state tribunals of jurisdiction over questions of state law, and if so, does the Act violate the Tenth Amendment to the Constitution in that respect?

4. Does Section 11(e) of the Holding Company Act purport to make a determination of the Commission thereunder final and binding on all affected security holders, in the absence of an approval of such determination, as being fair and equitable, by a court of competent jurisdiction, and if so, does the Act violate the Fifth Amendment of the Constitution in that respect?

5. Even if the Commission is given complete and exclusive jurisdiction generally as to Section 11(e) proceedings, does this include jurisdiction to permit a utility company to relieve itself of obligations validly assumed and to alter or impair creditors' rights or to terminate existing leases?

6. Even if the Commission has complete and exclusive jurisdiction, and is lacking in power under the Holding

Company Act to remit security holders to enforcement of their rights in other tribunals, would not this matter in that event have to be remanded for further consideration by the Commission so that it may give proper consideration to rights arising under state laws as an element of fair and equitable treatment?

Reasons Relied on for the Allowance of the Writ.

1. This case presents important questions of Federal Law which have not been, but should be, determined by this Court.

A.

The court below held that state courts were deprived of jurisdiction of questions of state law solely for the reason that the Commission had rendered a decision and report under Section 11 of the Holding Company Act, even though the Commission's report expressly reserved to affected security holders the right of pursuing their state law remedies. In so doing it relied upon the decision of this Court in *Schwabacher* v. *United States* (334 U. S. 199) decided May 3, 1948. In this respect, it is submitted that the court below misconstrued the *Schwabacher* case, which is distinguishable from the instant case in at least three major respects:

(a) In the *Schwabacher* case this Court gave great weight to the provision of Section 5 of the Interstate Commerce Act, which expressly relieves the parties from "the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal". No corresponding provision is contained in the Holding Company Act.

(b) Section 21 of the Holding Company Act, unlike Section 5 of the Interstate Commerce Act, expressly recog-

nizes that the Commission is not to have exclusive jurisdiction where the jurisdiction of others raises no conflict. It provides:

> "* * * nor shall anything in this chapter affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder."

(c) Section 25 of the Holding Company Act, unlike Section 5 of the Interstate Commerce Act, also expressly recognizes the concurrent jurisdiction of state courts in suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, the Act by providing:

> "* * * The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this chapter or the rules, regulations, or orders thereunder, and *concurrently with State and Territorial courts,* of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or the rules, regulations, or orders thereunder. * * *" (Emphasis supplied.)

It is submitted, from the foregoing, that the decision in the *Schwabacher* case does not control, and that the court below has mistakenly applied that decision to circumstances where, because of the dissimilarity of the statutes in question, it is not applicable.

The decision of the state court below raises an important question in the area of the delicate interrelations of

state and federal authority. Extension of the principle of the *Schwabacher* case to other fields and to other federal statutes, so as to deprive state courts of jurisdiction, raises issues of such substantial importance as to require determination by this Court.

B.

The court below held that it was "beyond the power" of the Commission to do what it purported to do in this case, namely to provide in a plan for the exercise, by affected security holders, of their rights under state law. In so doing, the court below construed the Holding Company Act, not only as a limitation upon the jurisdiction of state courts, but also as a limitation upon the power of the Commission.

Such a power has heretofore been exercised by the Commission in other cases, where it has offered security holders the alternative of treatment in accordance with applicable local law as determined by local tribunals. See for example: *In re Massachusetts Lighting Companies*, 3 S. E. C. 16, 17 (1938); *In re Commonwealth Gas & Electric Companies*, 3 S. E. C. 13, 14 (1938); *In re Central Massachusetts Light & Power Co.*, 3 S. E. C. 10, 11 (1938); *In re East Tennessee Light & Power Co.*, 6 S. E. C. 985, 990 (1940); *In re Virginia Electric & Power Co.*, 15 S. E. C. 903, 906, 939 (1944); *In re Indiana Hydro-Electric Power Co.*, 15 S. E. C. 941, 955 (1944).

This aspect of the decision below raises an important question of the interpretation of the Holding Company Act as to the power of the Commission thereunder that has not heretofore been, but should be, determined by this Court.

C.

Both the Commission and the court below treated the proceedings before the Commission as one pursuant to Section 11(e) of the Holding Company Act. However, the so-called "plan" approved by the Commission, by its express terms was designated an "offer", and was expressly made subject to acceptance by the Railroad Company within the limited period of nine days. The offer was so limited because of the avowed purpose of the scheme to offset its costs against tax savings within the tax year 1944. While the Commission approved the proposal as "necessary" under the Act, it made no provision for the contingency that the offer might be rejected or might fail of acceptance within the time limited therefor. Nor did the Commission distinguish its views from those of June 1940, when it had expressly authorized the Power Company to acquire the stock of the Railroad Company.

Consequently there is presented the question of interpretation of Section 11(e) of the Holding Company Act as to whether the approval by the Commission of a conditional offer is a plan within the meaning of that Section. This question has not been, but should be, determined by this Court.

D.

The so-called "plan" approved by the Commission has not been made the subject of approval in proceedings instituted in a United States district court by the Commission, in accordance with the provisions of Section 11(e) of the Holding Company Act, nor has it been found to be fair and equitable by any court.

Petitioners instituted the proceedings below to obtain an adjudication of questions of state law, a procedure contemplated by the Commission's report. Certain plaintiffs below, other than petitioners, instituted proceedings in the

Court of Appeals for the First Circuit to obtain a review of the Commission's action but withdrew the appeal (R. 2-4, 540).

As a result of the decision below, petitioners are deprived of the opportunity of an adjudication in the state courts. Petitioners cannot themselves institute a proceeding in the district court and review by the Court of Appeals is not available for the reason that they are not aggrieved parties under Section 24 (a) of the Holding Company Act. See also: *Blatchley* v. *Securities and Exchange Commission*, 157 F. (2d) 898 (C. C. A. 1st, 1946); *Goldfine* v. *Securities and Exchange Commission*, 157 F. (2d) 899 (C. C. A. 1st, 1946); *Okin* v. *Securities and Exchange Commission*, 143 F. (2) 960 (C. C. A. 2nd, 1944).

The result of the decision below is to deprive petitioners of all opportunity for any judicial review or determination of their rights. The question is therefore presented as to whether, under these circumstances, the plan is binding on objecting security holders under the terms of the Holding Company Act, and, if that Act purports to make it so binding, whether the Act is constitutional in that respect. This question has not heretofore been, but should be, decided by this Court.

Nothing contained in the opinion in *Securities and Exchange Commission* v. *Central-Illinois Securities Corporation*, decided by this Court on June 27, 1949, is determinative of this question, or of any other question raised in this petition.

E.

The sitting justice concluded that the holders of stock of the Railroad Company did not have a guaranty running to them, separate and apart, from the lease, relying upon the provision of the lease that "the termination of this lease

for any cause except the default of the Power Company shall operate to terminate and cancel any and all guaranteed dividends" (R. 89-A). The erroneous determination of the court below that the Holding Company Act prevented it from applying state law deprived petitioners of a final ruling on this question.

The ruling of the sitting justice was clearly in error, for the following reasons:

(a) The lease contemplated its termination only for three reasons (i) default by the Power Company, (ii) default by the Railroad Company or (iii) a taking by eminent domain of the portion of the properties yielding at least one-third of the gross earnings (Article XVIII) (R. 114-A). Consequently, it is clear that the lease intended to provide for termination of the guaranty only upon default by the Railroad Company or upon a taking by eminent domain.

(b) This conclusion is reinforced by the specific provisions of the lease which contain a clear expression of intent to assume an obligation to pay the guaranteed dividends to the stockholders. Article I provides (R. 84-A, 92-A, 107-A):

> "But the Power Company does not hereby assume any obligation to pay any part of said rental to any holders of such bonds or other obligations, excepting only the holders of stock of the Railroad Company."

This provision expressly negatives any guaranty by the Power Company of the principal of bonds or notes or any obligation to the bondholders to pay interest, while making a clear distinction as to its obligations to pay directly to the holders of the stock (R. 84-A, 92-A, 107-A). The existence of the obligation of guaranty was clearly contemplated in the vote of the stockholders of the Power Company authoring the directors to make the guaranty (R. 31).

The guaranty thus established between the Power Company and the stockholders of the Railroad Company the relationship of debtor and creditor.

A similar conclusion was reached by the Commission, which stated (R. 276-A):

> "In our opinion the claim of a Portland stockholder, based on Central Maine's guarantee, is analogous, although slightly inferior, to that of a long-term unsecured creditor."

This raises the question of whether or not, under Section 11(e) of the Holding Company Act, the Commission's findings and conclusions with respect to the treatment of creditors, as distinguished from stockholders, is final and conclusive in the absence of a decision by any court of competent jurisdiction, determining that the proposed treatment is fair and equitable. This question has not heretofore been, but should be, determined by this Court.

F.

The Commission approved the so-called plan purporting to eliminate the Power Company's obligation of guaranty, and thus construed Section 11(e) of the Holding Company Act as permitting the divestment of an obligation, as well as an asset.

A contrary construction of the Act is indicated by *In re Laclede Gas Light Company*, 57 F. S. 997 (D. C. Mo., 1944) aff'd *sub. nom. Massachusetts Mutual Life Ins. Co.* v. *Securities and Exchange Commission*, 151 F. (2) 424 (C. C. A. 8th, 1945) cert. den. 327 U. S. 795, in which the district court said (p. 1005):

> "We do not believe that the Act should be construed to provide, and we do not so hold, that because

Laclede Gas is under legal compulsion to submit a plan that Laclede Gas could voluntarily use a situation as an opportunity to divest itself of legal obligations."

This raises a question, corollary to that referred to in E above, of whether or not Section 11(e) of the Holding Company Act authorizes any action the result of which would permit a utility company to relieve itself of an obligation validly assumed. This question has not heretofore been, but should be, determined by this Court.

G.

The so-called plan approved by the Commission embodied an offer to be made by the Power Company to the Railroad Company for termination of the lease. The Power Company voted its 49% stock interest of the Railroad, together with proxies for other stock solicited by it, in favor of acceptance and caused the board of directors of the Railroad Company to approve, over the objections of petitioners.

Unlike the various portions of the Bankruptcy Act, such as Section 77 [11 U. S. C. A. §205], which specifically authorize the rejection of leases, the Holding Company Act contains no such provision. Even under the explicit grant of authority of Section 77 of the Bankruptcy Act, the power to deal with the lessor is limited, *Callaway* v. *Benton*, 93 L. ed. (adv. op.) 443, decided February 7, 1949.

In view of the domination of the Railroad Company by the Power Company and its ownership of 49% of the Railroad Company's stock, the effect of the Commission's approval of the offer was to authorize the Power Company to reject the lease, despite the absence of specific authority therefor in the Holding Company Act. This

raises the question of whether or not the Commission has such authority, a question that has not heretofore been, but should be, determined by this Court.

2. The decision of the court below is in conflict with decisions of this Court.

A.

In refusing to apply principles of law properly applicable and to follow the Commission's report insofar as it left security holders to their proper remedies, the decision of the court below is in conflict with the decision of this Court in *Callaway* v. *Benton*, 93 L. ed. (adv. op.) 443, decided February 7, 1949.

In that case, arising under Section 77 of the Bankruptcy Act, the plan of reorganization provided for acquisition on specified terms of certain properties leased from South Western or, if not so acquired, for rejection of the lease. The district court held that the question of whether a Georgia railroad (South Western) could convey all of its properties without unanimous consent of its stockholders was one for the bankruptcy court applying federal law and that conveyance could be made on consent of holders of a majority of the shares. This Court reversed and held (at p. 447):

> "We do not agree. The language of the plan and the factors which the Commission took into consideration in arriving at the amount offered South Western for its properties indicate clearly that, so far as the reorganization plan contemplates acquisition of the lessor railroad, the ordinary rules of offer and acceptance were intended to apply. That has invariably been the practice."

After pointing out that this did not derogate from decisions upholding the power of the Commission, this Court said (at p. 449):

> "There is therefore no occasion to override state law. The plan implicitly accepts it as controlling. The fact that the law may make acceptance of the offer less likely than would be the case if the offeree were incorporated elsewhere does not change the picture. We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded."

In the *Callaway* case this Court required that proper effect be given to a plan provision contemplating that action be taken in accordance with applicable state law.

In direct conflict with this decision, the ruling of the court below refuses to give effect to the report of the Commission expressly providing that stockholders should be free to exercise their rights under the appraisal statute or by other means. This conflict should be resolved by this Court.

B.

It is submitted that the decision of the court below, in refusing to adjudicate the rights of petitioners, is in conflict with the decision of this Court in *Central New England R. Co.* v. *Boston & A. R. Co.*, 279 U. S. 415 (1929).* In that case, Central New England had received from the Interstate Commerce Commission authority to discontinue operations over the line of Boston & Albany, conducted pursuant to an operating agreement. Operations were discontinued and Boston & Albany sued for the payments due under the operating agreement and received payment. In affirming, this Court concluded,

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* Recently affirmed as to principle in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 (1946).

contrary to the contentions of Central New England, that the grant of authority to abandon operations did not relieve the carrier of its contractual obligation to pay rent and that the state court had jurisdiction to entertain the action. In refusing to pass upon the argument that the Interstate Commerce Commission had no power to grant relief from the obligation, this Court said (at p. 418):

> "* * * It suffices, for the present purposes, that the certificate and the accompanying report of the Commission did not purport to exercise such a power. * * *"

In the *Central New England* case, this Court held that since the Commission, as a result of silence in its report, did not assume jurisdiction the contract rights were properly subject to adjudication in state courts and the obligor was not relieved of his obligations.

In the instant case, the report of the Commission is even more explicit and expressly contemplates the enforcement of remedies in a state tribunal. Consequently, the decision of the court below, refusing to adjudicate such rights, is in conflict with the decision of this Court in the *Central New England* case.

C.

As already set forth (*supra*, p. 14), the court below mistakenly relied upon the opinion of this Court in *Schwabacher* v. *United States* (334 U. S. 182) in concluding that the state courts had no jurisdiction. However, even if the principle of the *Schwabacher* case were generally applicable here, the action of the court below in dismissing petitioners' bill of complaint nevertheless is in direct conflict with the action taken by this Court in that case.

In the *Schwabacher* case this Court held, under the particular provisions of Section 5 of the Interstate Commerce

Act, that no rights granted to dissenting stockholders by state law concerning liquidation survived a merger agreement approved by the requisite number of stockholders and approved by the Interstate Commerce Commission as just and reasonable. This Court went on further to hold (334 U. S. 182, 201):

> "• • • Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable. In making that determination, those rights are to be considered to the extent that they may affect intrinsic or market values. While the Commission has found that what the appellants are given in this plan is just and reasonable, the record indicates that it may have declined to consider these claims, even if they are found to have some effect on the intrinsic value of the stock, because it thought it lacked jurisdiction. Under these circumstances, we cannot be sure that in arriving at its conclusion that the plan was just and reasonable it did not exclude some factors that it should consider under the views set out in this opinion. We therefore reverse the judgment below and remand the case to the Commission for reconsideration under the principles herein expressed."

Applying these principles, it is evident that the decision of the court below conflicts with the *Schwabacher* case.

The Commission, in its report to the security holders, in the instant case, concluded as follows (R. 259-A):

> "• • • Although this Commission has found the plan fair and equitable, whether or not any security holder should vote in favor of the plan or choose to exercise his rights under the appraisal statute or by other means should be determined by his independent judgment.• • •"

Here, as in the *Schwabacher* case, it is evident that there can be no certainty that in arriving at its conclusions the Commission took into account the rights of the security holders under the state laws. Indeed, since the Commission here expressly pointed out to the security holders that they might exercise their rights by other means, it must be assumed that the Commission's conclusions contemplated the availability of such remedies to the security holders. Even if the decision below were ultimately sustained, in so far as it concluded that there was complete lack of jurisdiction in the state courts and lack of Commission power to remit security holders to their state law remedies, this major assumption inherent in the Commission's finding of fair and equitable treatment, would be removed. Consequently, in accordance with the decision in the *Schwabacher* case, the matter should, in that event, be remanded to the Commission for reconsideration.

The decision of the court below directing that the bill in equity be dismissed, is in direct conflict with the decision of this Court in the *Schwabacher* case and should, therefore, be reviewed by this Court in order that that conflict may be appropriately resolved.

Moreover, under the circumstances by which acceptance of the offer was obtained, a question is raised as to compliance with the standards announced by this Court in *Taylor* v. *Standard Gas & Electric Company*, 306 U. S. 307 (1939).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Judicial Court of the State of Maine, commanding that court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all pro-

ceedings in said court in this case to the end that this cause may be reviewed and determined by this Court and that the order of said Supreme Judicial Court of Maine be reversed and that your petitioners be granted such other and further relief as may appear proper.

Dated, July 26, 1949.

FRED N. OLIVER,
MICHAEL F. McCARTHY,
WILLARD P. SCOTT,
Attorneys for Petitioners,
110 East 42nd Street,
New York 17, N. Y.

FRANKLIN R. CHESLEY,
Of Counsel.

477 Congress Street,
Portland, Maine.

[Appendix Follows]

Appendix.

Public Utility Holding Company Act of 1935 (49 Stat. 838; 15 U. S. C. A. §79).

SECTION 11 (15 U. S. C. A. §79k)

Simplification of Holding Company Systems—Examination By Commission with View to Simplification.

(a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

Limitations on operations of holding company systems.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, how-*

ever, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

* * * * * *

Submission by company of plan for simplification; court enforcement of order of approval; appointment of trustee.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at

any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this chapter, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

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SECTION 21 (15 U. S. C. A. §79u).

Effect on Other Laws.

Nothing in this chapter shall affect (1) the jurisdiction of the Commission under sections 77a to 77mm or sections 78a to 78jj of this title over any person, security, or contract, or (2) the rights, obligations, duties, or liabilities of any person under such sections; nor shall anything in this chap-

ter affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder.

* * * * * *

SECTION 25 (15 U. S. C. A. §79y).

Jurisdiction of Offenses and Suits.

The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this chapter or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28, and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893 (D. C. Code, §17-101). No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against the Commission in any court.